UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM JENNINGS,

Plaintiff,

Case No. 13-13308
Hon. Avern Cohn

vs.

GENESEE COUNTY DEPUTIES PATRICK FULLER,
LT. ROBERT NUCKOLLS, DAVID KENAMER
SGT. KYLE GUEST, MARK WING, and JASON WHITE
Jointly and Severally,

Defendants.

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PLAINTIFFS' MOTION TO PRECLUDE DEFENDANTS' EXPERT TESTIMONY

Plaintiffs filed a motion to preclude Defendants' expert's testimony because, as evidenced by the expert's Rule 26 disclosures, he intends to opine concerning the ultimate issue of liability (whether the force used against the Plaintiffs was "reasonable.") and to opine concerning the ultimate issue of punitive damages (whether Defendants acted sadistically or with malice). In *Scott v. Ferndale*, Case No. 1999-cv-71113, Hon. Avern Cohn presiding, this court struck Mr. Ross' identical opinion and precluded him from testifying. For the reasons that follow, Mr. Ross should be precluded from testifying.

In *Berry v City of Detroit*, 25 F.3d 1342, 1353, the plaintiff's expert testified that the City of Detroit had a policy of deliberate indifference with regard to training and/or disciplining their officers as to the use of deadly force. The Sixth Circuit found that this testimony was improper for two reasons. First, the court noted that although an expert's opinion could "embrace an ultimate issue to be decided by the trier of fact," the "issue embraced must be a factual one." *Id.* at 1353. The court stated however that the expert's opinion embraced the ultimate question of liability, not a question of fact, and that therefore it was improper for the expert to opine on that matter. *Id.*

The court also found error in the expert testifying that the City's actions and omissions amounted to deliberate indifference because deliberate indifference was a legal term. The court noted that it was the sole province of the court to define legal terms and that an expert's testimony as to whether conduct was consistent or inconsistent was a legal term, invaded this province of the court. *Id.* at 1353-1354. The court stated, "Even if a jury were not misled into adopting outright a legal conclusion proferred by an expert witness, the testimony would remain objectionable by communicating a legal standard -- explicit or implicit -- to the jury." *Id.* at 1354.

Finally, in striking the expert testimony, the Sixth Circuit relied upon the decision in *Hygh v. Jacobs*, 961 F.2d 359 (2d. Cir. 1992). There, the Second Circuit held that conclusions in the form of expert testimony that **merely told the jury what result to reach** were inadmissible.

25 F.3d at 1354, quoting *Hygh*, 961 F.2d at 364.

In *Torres v Oakland County*, 758 F.2d 147 (6th Cir. 1985), the Sixth Circuit also condemned this type of testimony. The court stated, "The problem with testimony containing a legal conclusion is in conveying the witness's unexpressed, and perhaps erroneous, legal standards to the jury. This 'invades the province of the court to determine the applicable law and to instruct the jury as to that law.'" *Id*. at 150. Moreover, the court in *Torres* made clear that "Rule 704, however, does not provide that witness's opinions as to the legal implications of conduct are admissible." (Citations omitted.) *Id*. at 150.

Finally, the *Torres* court, while noting that the trial courts are generally accorded a relatively wide degree of discretion in admitting testimony which arguably contains legal conclusions, it found that it was improper for witnesses to use legal terms in their testimony which are essentially terms of art:

> The best resolution of this type of problem is to determine whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the venacular. If they do, exclusion is appropriate.

The court stated that it was inappropriate for a witness to testify that certain conduct was "unlawful" since the terms "demanded an understanding of the nature and scope of the criminal law." The court also found that it was improper for a witness to testify that a product was "unreasonably dangerous." *Id*. at 150-151.

As stated by the Sixth Circuit "[c]ourts have permitted experts to testify about discrete police-practice issues when those experts are properly credentialed and their testimony assists the trier of fact." Id. at 908 (citing Dickerson v. McClellan, 101 F.3d 1151, 1163-64 (6th Cir.1996), Kladis v. Brezek, 823 F.2d 1014, 1019 (7th Cir. 1987)). Similarly, district courts directly considering the admissibility of expert testimony regarding police procedures have found such testimony to be admissible, so long as the expert refrains from expressing legal conclusions. Alvarado v. Oakland Co., 809 F.Supp.2d at 690-91 (expert may testify regarding nationally recognized police standards governing the use of excessive force, as well as the specific departmental excessive force guidelines to which the officer was subject, but could not opine as to whether the officer's conduct in arresting the arrestee was unreasonable under those guidelines or practices); Norman v. City of Lorain, Ohio, 2006 U.S. Dist. LEXIS 97840, 2006 WL 5249725 at *3 (N.D.Ohio, Nov. 27, 2006)(unpublished)(expert may testify concerning proper procedures to be followed in the situation facing the officer, but may not testify that the force used by the officer was "unreasonable" or "unnecessary" or otherwise express any legal conclusions while testifying). See also DeMerrell v. City of Cheboygan, 206 Fed.Appx. 418, 426 (6th Cir., Oct. 31, 2006)(unpublished)(expert's conclusions that it was "objectively unreasonable" for the officer to shoot the suspect; that "a reasonable officer on the scene would not have concluded at the time that there existed probable cause that [the suspect] posed a significant threat of death or serious physical injury to the officer or others"; and the use of deadly force by the officer was "improper and unnecessary" were improper legal conclusions).

In this case, Defendants' expert has done precisely what these cases instruct against, which is to opine on and define legal standards. In fact, the expert's testimony was even more of an invasion of the province of the court in instructing the jury on the legal standards than in the cases cited.

In this case, the legal question is whether the use of force constituted excessive force. In his report, Ross repeatedly opines that the Defendants' use of force was "reasonable", "justified ", "necessary", "proper", and "that the officers acted in good faith", thereby not only opining on a legal standard regarding punitive damages, but also on the subjective intent of ghe officers. He further opines about what a reasonable officer on the scene would have done or concluded. See Report pp. 8, 12, 16, 17, 18, 19, 21-23. He specifically stated:

1. "The use of a TASER in my opinion was used with **good faith** to maintain security, used to protect the deputies, used to gain compliance and control, **was proportionate to the need and in response** to Mr. Jennings' active resistence." (Report p. 19.)(Emphasis added.)

2. "In my opinion it was **reasonable** to apply the TASER in the dry stun mode". (Report p. 18.);

3. "[T]he knee placement [on Mr. Jennings head and face] by Deputy Kennamer was **reasonable**". (Report p. 17.)

4. "[I]twas reasonable to attempt to place Mr. Jennings in a restaint chair..." (Report p. 17.)

6. "I conclude at no time did the deputies actions arise to the level of punishment or torture or did they demonstrate a sadistic or malicious use of force." (Report p. 22.)

7. "Deputies responded to the active resistence of Mr. Jennings with reasonable force...". (Report p. 22.)

As is evidenced in the attached report, the witness was asked to prepare a report in which he opined on what conduct and various actions would be "reasonable", "malicious", and "sadistic" under certain circumstances. This testimony is as nothing more than the expert communicating to the jury, either implicitly or explicitly, what the legal standard of "reasonableness" malicious", and "sadistic" are. (For example, it is reasonable for the officers to use one type of force or another under certain circumstances. Thus, the expert is doing nothing other than defining reasonableness for the jury.)

Thus, this witness is nothing less than the "liability expert," whose function it is to tell the jury what result they should reach.

WHEREFORE, Defendants' expert should be stricken or his testimony should limited accordingly.

Respectfully submitted,

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